UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STANLEY TALLEY, Plaintiff, v. JO ANNE B. BARNHART, Commissioner, Social Security Administration, Defendant.	Case No. C04-01710-RSM REPORT AND RECOMMENDATION

Plaintiff Stanley W. Talley proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (the "Commissioner"). Following a lengthy series of hearings and appeals, an administrative law judge ("ALJ") denied plaintiff's most recent application for Title II disability and disability insurance benefits. For the reasons described below the Court recommends that the ALJ's decision be affirmed and the plaintiff's suit dismissed.

I. FACTS AND PROCEDURAL HISTORY

The plaintiff is fifty-nine-years old and has a high school education and at least three years of college. AR 16, 277, 542. He was physically active and held a variety of jobs. AR 58-68. In 1977, Mr. Talley sustained an on-the-job back injury while working for the Coca-Cola Company when a case of soft drinks fell on him. AR 16, 58-68. He subsequently underwent back surgery but continued to complain of, *inter alia*, chronic back pain, a

ganglion cyst in his left wrist, and problems related to his addiction to drugs and alcohol. AR 16. In sum, plaintiff has alleged that his pain and physical limitations rendered him disabled after his March 14, 1977, injury and prior to September 30, 1982, his "date last insured."

Plaintiff's first application for Title II benefits occurred on December 17, 1979, but that claim was rejected. AR 538. Plaintiff filed a second application for Title II benefits on May 29, 1991. *Id.* This application was also denied and is the subject of the present appeal. AR 551. In the meantime, the plaintiff filed for Supplemental Security Income ("SSI") benefits under Title XVI in 1985, and received a favorable decision. AR 538. He began receiving Title XVI benefits in 1988, with a disability onset date of March 1, 1985. *Id.* Those payments were later terminated because of plaintiff's "excess resources," an inheritance from his late mother.[1] *Id.*

As discussed above, this appeal arises in connection with plaintiff's *second* application for Title II benefits filed on May 29, 1991. AR 538. In that application, plaintiff essentially alleged impairment from conditions similar to those described above. AR 538. ALJs denied his claims on November 8, 1994, and again on November 7, 1995. AR 538. The Social Security Administration's Appeals Council ("AC") denied review on May 31, 1997, but the United States District Court for the District of Oregon remanded the case to the AC on December 12, 1997, which in turn remanded it for another hearing.[2] AR 553, 661. It appears

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[1]Plaintiff received worker's compensation benefits from the State of Oregon during this period as well. AR 542.

[2]The district court's remand ordered the Commissioner to hold further proceedings that included: (1) new longitudinal analysis of plaintiff's residual functional capacity for the period in question, based on all of the evidence, including treating and examining sources. It also ordered the ALJ to explain his findings for the record; (2) a supplemental hearing to determine whether a Listing may have been met for the period in question and in which the testimony of medical and vocational experts would be heard (the latter's testimony to include opinions based on a hypothetical as to plaintiff's condition prior to January 1, 1993). The hearing would also permit other witnesses to give testimony; (3) plaintiff's, and all other testimony, was to be considered in light of SSRs 96-4p, 96-7p, and 20 C.F.R. § 404.1529; and

that plaintiff at this time offered "new" evidence consisting of medical records from one Dr. Purdy. AR 541; 686-709. Nevertheless, following plaintiff's third hearing, the ALJ issued a decision on January 13, 1999, that found plaintiff was not under a disability for the period in question and was therefore not eligible for benefits. AR 661-62.

Plaintiff again appealed to the AC asserting several errors and once again offered "new" evidence as to plaintiff's condition during the period in question. AR 710. This new evidence consisted of a letter from a vocational expert ("VE") that assessed the work capacity of a different claimant with allegedly similar conditions. AR 672, 710. On December 4, 2001, the AC assumed jurisdiction and again remanded the case to an ALJ.[3] AR 669-71.

II. THE 2002 ALJ DECISION

In his 2002 decision, the ALJ found that the claimant had not been under disability "at any time, during the relevant period" and that he was therefore not entitled to a period of disability or disability insurance benefits. AR 551. He noted that he believed the district court erroneously allowed the submission of the "new evidence," that the court had not reviewed that evidence, and that such information could not be considered on appeal without a showing of good cause, which he believed had not been made. AR 540-41. The ALJ then applied the

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(4) the AC and ALJ were ordered to take action to complete the administrative record. AR 554-55.

[3]AC's remand ordered the ALJ to: (1) evaluate the plaintiff's subjective complaints and provide rationale for his evaluations; (2) evaluate the plaintiff's mental impairment and to provide rationale for his evaluation; (3) give further consideration to petitioner's maximum residual capacity during the period in question and to provide "specific references to evidence of record" in support. In making this evaluation, the ALJ was to consider treating, examining, and nonexamining sources, and explain his rationale for weighing that evidence. The ALJ was also permitted to call examining and treating sources to provide additional evidence or clarification of what actions plaintiff could perform, despite his impairments through September 31, 1982; (4) obtain further evidence from a medical expert to clarify the nature and severity of plaintiff's condition, if necessary; and (5) if necessary, obtain evidence from a vocational expert to clarify the effect of the assessed limitations on the plaintiff's occupational base. AR 669-70.

five-step sequential evaluation process and at step five determined that, despite plaintiff's impairments, he was able to perform certain types of light and sedentary work. AR 541-50.

Plaintiff timely filed for appeal to the AC, again submitting new evidence relating to his condition during the period in question.[4] AR 524, 529. The AC refused to assume jurisdiction over plaintiff's 2004 appeal. AR 523. The 2002 ALJ decision following the court remand is therefore the Commissioner's final decision for the purposes of this Court's judicial review. *See* 20 C.F.R. § 404.984. Plaintiff appealed the Commissioner's final decision to this Court, seeking a reversal of his decision and a remand to determine benefits.

III. THE PERIOD AT ISSUE

The plaintiff's Title II disability insurance lapsed on September 30, 1982. AR 538. A claimant must establish disability prior to the date last insured in order to qualify for Title II disability benefits. *See Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998). In this case, plaintiff filed his application for benefits in 1991, nine years *after* his date last insured of September 30, 1982. AR 538. To obtain benefits, plaintiff must establish that he became disabled within the meaning of the Social Security Act during the relevant period of March 14, 1977 (the date of his on-the-job injury), and September 30, 1982 (the date of his last quarter of coverage). AR 538.

IV. JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) (2005).

V. STANDARD OF REVIEW

The court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *See* 42 U.S.C. § 405(g); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993);

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[4]This new evidence appears to be limited to an Orthopedic Consultation Supplemental Report dated October 22, 1981. AR 529.

Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

If the court determines that the ALJ has erred, then the court has discretion to remand for further proceedings or to award benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

> Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77.

VI. EVALUATING DISABILITY

As the claimant, Mr. Talley bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than twelve months[.]" 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled only if his impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other substantial gainful activity existing in the national economy.

See 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Social Security regulations set out a five-step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Social Security Act. *See* 20 C.F.R. §§ 404.1520, 416.920. At step 1, the claimant must establish that he or she is not engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the claimant establishes that he or she has not engaged in any substantial gainful activity, the Commissioner proceeds to step 2. At step 2, the claimant must establish that he or she has one or more medically severe impairments or combination of impairments that limit his or her physical or mental ability to do basic work activities. If the claimant does not have such impairments, he or she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe impairment, the Commissioner moves to step 3 to determine whether the impairment meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant who meets or equals one of the listings for the required twelve-month duration requirement is disabled. *Id.*

When the claimant's impairment neither meets nor equals one of the impairments listed in the regulations, the Commissioner must proceed to step 4 and evaluate the claimant's residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the Commissioner evaluates the physical and mental demands of the claimant's past relevant work to determine whether the claimant can still perform that work. *Id.* If the claimant is not able to perform his or her past relevant work, the burden shifts to the Commissioner at step 5 to show that the claimant can perform some other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

VII. DECISION BELOW

In his decision dated August 19, 2002, the ALJ concluded that Mr. Talley could not return to his former employment as of the date of the expiration of coverage. However, he also found that Mr. Talley was able to engage in "simple, routine, unskilled-entry level" light exertion work during the period at issue, and therefore, was not disabled. AR 540. His specific findings included:

> 3. The claimant has an impairment of Degenerative Disc Disease; an impairment which is considered to be "severe" based on the requirements in the Regulations 20 C.F.R. § 404.1520.
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> . . .
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> 4. [T]he claimant's medically determinable impairment does not meet or medically equal any of the listed impairments in Appendix 1, Subpart P, Regulation No. 4, including listing 1.05C.
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> 5. [T]he claimant's allegations regarding his limitations are not entirely credible . . . .
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> 7. The claimant has the residual functional capacity for light exertion with postural and vocational non-exertional limitations, as set forth in the body of the decision (20 C.F.R. § 404.1567).
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> 11. The claimant has a combination of exertional and non-exertional functional limitations, wherein no one rule in Appendix 2 would direct a conclusion of disabled or not disabled . . . . [T]he claimant is disabled under a framework application of the medical-vocational guidelines, Appendix 2, Subpart P of the regulations, Table 2, guidelines 202.00(b) and 202.21.
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> 12. [T]he claimant has not been under a "disability," as defined in the Social Security Act, at any time, during the relevant period of March 14, 1977, through September 30, 1982 (20 C.F.R. § 404.1520(f)).

AR 550-51.

VIII. ISSUES ON APPEAL

Although the plaintiff's briefing proceeds in many directions, it appears that the issues raised fall into three areas:

A. Did the ALJ commit reversible error relating to the procedural aspects of the hearing?

B. Did the ALJ err in his disability analysis at steps three and four?

C. Did the ALJ err in his disability analysis at step five?

IX. DISCUSSION

A. The ALJ Did Not Commit Reversible Error Relating to Procedural Aspects of the Hearing.

1. The ALJ's Treatment of the "New" Evidence Did Not Constitute Reversible Error.

Plaintiff argues that the ALJ committed legal error by "disregarding orders issued by the [AC]." Pl. Op. Br. 10; Pl. Rply. Br 1-2. He alleges that the ALJ improperly rejected new evidence submitted by him that was accepted by both the AC and district court and which they ordered the ALJ to address. Pl. Op. Br. 10; Pl. Rply. Br. 1-2. The Commissioner responds that the ALJ properly rejected the evidence and gave sufficient reasons for doing so. Def. Br. 6. She further responds that this Court has no jurisdiction to review a decision by the AC because such orders are not a "final decision" by the Commissioner. Def. Br. 7.

ALJs have a duty to "take any action that is ordered by the [AC] and may take any additional action that is not inconsistent with AC's remand." 20 C.F.R. § 404.977(b). In connection with its specific orders on remand, the AC ordered the ALJ to, *inter alia*, "*address* the evidence which was submitted with the request for review." AR 671 (emphasis added).

In this case, plaintiff's argument appears to surround the ALJ's treatment of a letter from a vocational expert ("VE") and of certain medical records. The VE letter concerns a different claimant named "Christine" that was purportedly submitted to show the VE's opinion

of someone with impairments allegedly similar to plaintiff's. AR 672, 710. The ALJ reviewed that letter and determined it to be immaterial and irrelevant because it dealt with an entirely different claimant. AR 541.

The AC's order did not require the ALJ to "accept" or "include" the new evidence, but rather to "address" it. AR 671. Plaintiff's interpretation appears to be that the ALJ was required to admit the new evidence into the record. Pl. Op. Br. 10. Nothing in the record or the term "address" requires such action. The ALJ determined that without more foundation or showing of relevance, the information involving another person would not be pertinent to the issues involving the plaintiff. This action complies with the AC's order, and does not require reversal.

Plaintiff also argues that the ALJ erroneously excluded medical evidence from Dr. Purdy, a treating physician, concerning the time period in question, including a letter that plaintiff states characterizes him as "disabled." Pl. Op. Br. 10; Pl. Rply. Br. 1-2. While the ALJ's decision notes his belief that the district court erroneously permitted the submission of these records, the ALJ nevertheless evaluated Dr. Purdy's medical reports in his decision. AR 542-43, 546. In addition, these documents are included in the record. AR 693. Plaintiff's argument that the ALJ ignored or excluded this evidence is without merit.

2. The ALJ Did Not Err by Failing to Summon a Medical Expert to Assess Plaintiff's Disability Onset Date and Medical Equivalency.

Plaintiff relies heavily on a social security ruling ("SSR") to argue that the ALJ was required to hear testimony from a medical expert ("ME") to establish his disability onset date and whether his condition was medically equivalent to a listing. Pl. Op. Br. 11. The Commissioner, however, replies that the decision to consult a medical expert rests entirely with the ALJ and that there was no requirement to call such an expert. Def. Br. 10.

As a general proposition, an ALJ must determine the onset date of a claimant's alleged disability in order to determine the period for which benefits may be awarded. The onset date

is the first day on which an individual is found to be disabled, as defined in the Social Security Act and accompanying regulations. *Morgan v. Sullivan*, 945 F.2d 1079, 1081 (9th Cir. 1991); SSR 83-20, 1983 WL 31249, at *1 (S.S.A.).

Here, plaintiff claims his onset date to be March 14, 1977, the date of his accident. AR 542. While it is clear that plaintiff was injured at this time, the ALJ determined that he was not disabled as a result of the accident or from the date of the accident through at least the end of his insured period in September 1982. Virtually all of the medical evidence in the record is dated after both the date of the injury and his date last insured. These documents describe plaintiff as suffering from, *inter alia*, degenerative disc disease and a cyst on his left wrist, and, as the ALJ noted, an increasing number of other impairments that "continued to grow" over time. AR 542, 544. The ALJ found, however, that the evidence in the record did not demonstrate that plaintiff was disabled during the period in question. AR 540. If that determination is supported by substantial evidence, then an "onset date" within the insured period does not exist. In such a case, there would be no requirement to call an expert to determine an onset date. As discussed below, the ALJ's determination that plaintiff was not disabled is supported by substantial evidence.

Similarly, plaintiff relies on SSR 86-8 and the Social Security Administration's *Hearings, Appeals and Litigation Law Manual* ("HALLEX") to argue that a remand is warranted because of the ALJ's failure to call a medical expert to determine whether plaintiff's condition was equivalent to a Listing under step 3 of the disability analysis. Pl. Op. Br. 11. SSRs do not carry the force of law, but are binding on all of the Social Security Administration, including ALJs. 20 C.F.R. § 402.35(b); *Chapman v. Apfel*, 236 F.3d 480, 484 n.9 (9th Cir. 2000); *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989). HALLEX, however, contains procedural guidance and policies that have been adopted by the Appeals Council for use by ALJs and staff members. *Moore v. Apfel*, 216 F.3d 864, 868 (9th Cir. 2000). While the agency intends that these procedures be followed, they are not

substantive rules and do not carry the force of law. *Id.* An ALJ's failure to comply with HALLEX therefore does not require remand. To the extent plaintiffs arguments assert the contrary, they are not persuasive.

SSR 86-8 states that:

> Any decision as to whether an individual's impairment or impairments are medically the equivalent of a listed impairment must be based on medical evidence demonstrated by the medically acceptable clinical and laboratory diagnostic techniques, including consideration of a medical judgment about medical equivalence furnished by one or more physicians designated by the Secretary.

1986 WL 68636, at *4 (S.S.A.) (superceded by SSR 91-7c to the extent it relates to children). State agency physicians rendered an unfavorable opinion of plaintiff's alleged disability. Pl. Op. Br. 12; AR 758-59. Apparently, plaintiff contends that SSR 86-8 required another such opinion after he submitted Dr. Purdy's reports. Pl. Op. Br. 12. While SSR 86-8 requires that a state-approved medical expert render an opinion on equivalence, it does not require another opinion when the claimant submits new evidence. A related SSR, however, specifies two *discretionary* circumstances when an ALJ should obtain an updated opinion on equivalence from a medical expert: (1) when no additional medical evidence is submitted but, *in the opinion* of the ALJ (or the AC), the evidence in the record suggests that a finding of equivalence may be reasonable; or (2) when additional medical evidence is received that *in the opinion* of the ALJ (or the AC) may change the state consultant's finding concerning equivalence. SSR 96-6p, 1996 WL 374180, at *3-4 (S.S.A.). Thus, it is the ALJ, not the state consultant, who "is responsible for deciding the ultimate legal question of whether a listing is met or equaled." *Id.* at *3. Here, the ALJ had no obligation to call in another expert to review the medical evidence. Indeed, the ALJ explicitly found that the "new" evidence here was not new at all and that it all addressed plaintiff's condition after his coverage lapsed. As a result, there was no requirement to summon a new medical expert.

3. The ALJ's Alleged Failure to Include Motions and One Transcript in the Record Does Not Warrant Remand.

Plaintiff filed a series of motions with the ALJ. These motions and a transcript of a hearing which took place on October 15, 1998, which the ALJ made reference to in his 2002 decision at issue, were not included in the record on this appeal. By order dated June 15, 2005, this Court ordered the Commissioner to supplement the record. Dkt. No. 20. The record was supplemented. Dkt. Nos. 23, 25. The supplementation of the record moots plaintiff's arguments that the absence of these records precludes effective judicial review.

Plaintiff submitted four motions to the ALJ, all of which were denied. AR 744.[5] These motions related to: (1) appointment of a medical expert to address medical equivalency, AR 757; (2) objections to capacity evaluations by Disability Determination Services physicians, AR 758; (3) a "similar fault" finding, AR 760; and (4) *Daubert* objections to VE testimony relating to use of Social Security Administration VEs and the lack of sources to indicate the number of jobs for any Dictionary of Occupational Titles code, AR 763. Pl. Op. Br. p. 7, n.4; Dkt. No. 23. With the exception of the first motion, the plaintiff has failed to discuss how any of these motions or, more importantly, the denial of these motions, are material to any of the issues on review.[6] As a result, denial of the motions by the ALJ cannot compel an order of remand. With respect to the first motion, as discussed above in Section IX(A)(2), the ALJ did not err in failing to call a medical expert.

Plaintiff also argues that the ALJ relied on medical expert testimony from a 1998 hearing to assist in establishing plaintiff's RFC, evaluating his credibility, and determining

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[5]In his brief, the plaintiff states that five motions were filed. The fifth "motion" is not actually a motion at all. Instead this "motion" consists of orders and opinions from other tribunals, submitted as evidence. AR 765.

[6]To the extent that plaintiff's *Daubert* objection to use of SSA vocational experts can be said to be fairly directed to determining the jobs existing during the period of disability as opposed to a particular bias, this issue is further discussed, *infra*, in Section IX(C) of this Report and Recommendation.

whether he met a Listing. Pl. Op. Br. 14-15. The ALJ made reference to the 1998 ME testimony of Dr. Borman in his opinion. AR 544-45. This 1998 testimony was not initially made part of the record before this Court. Mr. Talley objected to the ALJ's 2002 decision, because the failure to include the 1998 testimony in the record precluded effective judicial review. In response to the Court's June 15, 2005, order, Dkt. No. 20, this transcript has been provided, and is now in the record. Dkt. No. 25. Upon review, the Court finds that Dr. Borman's testimony, AR 774-83, constitutes substantial evidence that support the ALJ's conclusions that Mr. Talley's impairments do not meet or equal a Listing, as well as the ALJ's RFC evaluation.

B. The ALJ Did Not Err in His Step Three or Step Four Disability Analysis.

At step 3 of the disability evaluation process, the ALJ determined that the plaintiff's impairments did not equal or exceed a listing during the period in question. The ALJ then concluded, at step four that the plaintiff had an RFC for light exertion with postural and vocational non-exertional limitations. The plaintiff cites a number of alleged errors regarding the ALJ's findings in this regard.

1. The ALJ Did Not Err by Failing to Properly Analyze Plaintiff's Testimony.

Plaintiff argues that the ALJ erred by failing to properly evaluate his testimony in making his RFC determination. Pl. Op. Br. 15-16. More specifically, he argues that the ALJ failed to evaluate that testimony in a manner consistent with the credibility factors set forth in SSR 96-7p and that provided clear and convincing justification for rejecting it. Pl. Op. Br. 15-16. He argues that the Commissioner relied exclusively on medical records that supported his decision. Pl. Rply. Br. 4. The Commissioner responds that the ALJ's evaluation was properly supported by substantial evidence and that it should therefore be upheld. Def. Br. 7-10.

According to the Commissioner's regulations, a determination of whether to accept a

claimant's subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281; SSR 96-7p, 1996 WL 374186 (S.S.A.). First, the ALJ must determine whether there is a medically determinable impairment that could reasonably be expected to cause the claimant's symptoms. *Id.* at 9(a) and (b); *Smolen*, 80 F.3d at 1281-2; SSR 96-7p, at *2. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms merely because they are unsupported by objective medical evidence. *Smolen*, 80 F.3d at 1282; *Reddick v. Chater,* 157 F.3d 715, 722 (9th Cir. 1998) (internal citations omitted). Absent affirmative evidence showing that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

When evaluating a claimant's credibility, the ALJ must specifically identify what testimony is not credible and what evidence undermines the claimant's complaints; general findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may consider "ordinary techniques of credibility evaluation" including the claimant's reputation for truthfulness, inconsistencies in her testimony or between her testimony and conduct, daily activities, work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which she complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (internal citations omitted).

Here, the ALJ found that there was medical evidence of an underlying impairment. AR 544. Because there was no evidence (nor any assertion) that plaintiff was malingering, the ALJ was required to provide specific clear and convincing reasons for disbelieving plaintiff's testimony in connection with the severity of his symptoms. He found that the plaintiff's testimony was not "entirely credible . . . consistent with . . . or supported by the overall evidence of record." AR 545. The ALJ's analysis of the record on this point is

thorough. He reviewed numerous doctors' reports and related documents that indicate plaintiff suffered from degenerative disc disease that caused persistent pain in his lower back and legs, had a drug problem, wrist injuries, and used a cane. AR 546-47. He also reviewed other reports that indicate the plaintiff was not "disabled." *Id*. Several of these sources indicate that plaintiff was ambulatory, able to stand and, despite persisting pain, was in many ways improving. *Id.* Based on these sources, the ALJ found plaintiff incapable of his prior work (which involved medium to heavy work), but able to perform other types of light work. AR 547-48.

The ALJ also identified specific testimony by plaintiff and the evidence to support his adverse credibility determination. He noted, for example, that the plaintiff testified he had always had problems with balance, despite contrary testimony that he played college level basketball and tried out for the Seattle Supersonics. AR 542. He also pointed to evidence indicating that his doctors were trying to wean plaintiff from his cane because of his improving condition, despite plaintiff's complaints. AR 543. He also reviewed the transcripts of prior hearings that revealed that plaintiff did not have mental deficiencies in concentration, persistence, or pace, despite allegations to the contrary. *Id.* These, and other specific findings, support the ALJ's adverse credibility determination and satisfy the clear and convincing reasons standard required by *Reddick*.

2. The ALJ Properly Evaluated Plaintiff's RFC.

Plaintiff argues that the ALJ erred in calculating his RFC by failing to use the analytical steps provided in SSR 96-8p. Pl. Op. Br. 17. He argues that the ALJ did not consider "all" of his impairments, including those that were not severe, failed to determine whether he was capable of working on a regular and continuing basis, and did not properly develop the record. Pl. Op. Br. 17. Defendant responds, however, that the ALJ's analysis included all necessary variables and was therefore full and complete. Def. Br. 13-14.

RFC is a medical determination of the plaintiff's remaining ability to perform physical and mental activities in light of the limitations imposed by his or her impairments. 20 C.F.R. §§ 404.1520(a)(1), 416.920(a)(1). The Commissioner's five-step process requires her to consider all of a claimant's impairments and to assess their RFC to determine whether he can still perform his past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e). If he cannot perform past relevant work, the Commissioner must then determine whether the claimant can engage in other types of substantial gainful work that exists in the national economy. *Id.* To make this determination, an ALJ must assess the claimant's abilities to work on a "regular and continuing basis," equivalent to a typical eight-hour per day, five-day per week work week. SSR 96-8p, 1996 WL 374184, at *2 (S.S.A.). The RFC determination must be based on all of the relevant evidence in the case, even evidence regarding symptoms that are not "severe." *Id*. at *5. It must also include a narrative discussion describing how the evidence supports the ALJ's conclusion, citing specific evidence. *Id.* at *7. In cases in which symptoms such as pain are alleged, the RFC assessment must thoroughly discuss and analyze the evidence and resolve inconsistencies. *Id.* Only after this analysis may an RFC be referred to in connection with the exertional categories of "light," "heavy," and so forth. *Id.* at *3.

In this case, the ALJ's RFC determination was consistent with the regulations' requirements. As noted above, the ALJ's decision is specific and well documented. With respect to the RFC analysis in particular, the ALJ thoroughly assessed plaintiff's many complaints, including plaintiff's persistent lower back pain, pain in his thigh, cervical stiffness, and "diffusely decreased range of motion." AR 546. The ALJ analyzed this evidence in light of other evidence that suggested plaintiff was improving and that he was both mobile and "able to do more than 'basic work activities.' " AR 547. For instance, he noted Dr. Purdy's observations that plaintiff's gait was slow, but that there were no definite signs of sciatica or nerve root irritation. AR 546. He also noted Dr. Purdy's observation that plaintiff had an increasing range of motion and better endurance. *Id.* The ALJ also analyzed

the opinions of Dr. Gritzka, who noted plaintiff had improved in terms of pain, posture, and mobility and that suggested plaintiff's use of cocaine and other drugs may have slowed his recovery. AR 547. In sum, the ALJ's RFC analysis was thorough and supported by substantial evidence and should therefore be upheld.

3. The ALJ's Failure to Specifically Address One Witness's Statement in His Decision is Harmless Error.

Finally, plaintiff argues that the ALJ erred by failing to consider a witness's statement regarding plaintiff's abilities without providing specific and legitimate reasons for doing so. Pl. Op. Br. 20; AR 682-85. He argues that the ALJ is obliged to consider observations by non-medical sources as to how an impairment affects a claimant's ability to work. *Id.*

In order to determine whether a claimant has an impairment, an ALJ may also consider lay witness sources, such as testimony from family members. 20 C.F.R. §§ 404.1513(d)(4), 416.913(d)(4). Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence. *Sprague v. Bowen,* 812 F.2d 1226, 1232 (9th Cir. 1987). It therefore cannot be disregarded without comment. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). If an ALJ wishes to discount the testimony of a lay witness, he must provide reasons germane to each witness. *Id.* Identifying inconsistencies between such statements and the record is sufficient. *Lewis v. Apfel*, 236 F.3d 503, 511-12 (9th Cir. 2001).

In this case, the lay witness testimony concerns a written statement from someone who knew the plaintiff. AR at 682-85. It appears that this was new evidence submitted for the 2002 hearing and, as such, does not appear to have been specifically addressed by the ALJ. While it is not surprising that the ALJ specifically failed to address every piece of evidence in this 750 page record, he should have addressed this evidence. Nevertheless, his failure to specifically evaluate the statement is harmless error and does not require remand. *Batson v. Comm'r of Social Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (finding harmless error where decision as a whole was supported by substantial evidence). To the contrary, in light

of the foregoing discussion, the ALJ's decision was supported by substantial evidence overall and should therefore be upheld.

C. The ALJ Did Not Err in His Step Five Analysis By Giving An Incomplete Hypothetical.

Plaintiff argues that the ALJ erred in making his RFC analysis by providing the vocational expert with a hypothetical that did not accurately characterize plaintiff's abilities. Pl. Op. Br. 19. Plaintiff argues that the ALJ improperly included in the hypothetical that plaintiff was capable of light work and that the VE's testimony fails to establish the availability of jobs in significant numbers that plaintiff could perform. Pl. Op. Br. 19-20; Pl. Rply. Br. 6. Defendant responds, however, that the ALJ's analysis included all necessary variables and was therefore full and complete. Def. Br. 13-14.

In the absence of other reliable evidence that demonstrates plaintiff's ability to perform specific jobs, an ALJ must call a VE to answer hypothetical questions concerning the claimant. *Magallanes*, 881 F.2d at 756 (internal citations omitted). The hypothetical, however, must contain all of the plaintiff's particular limitations, be based on the medical evidence, and must be supported by the record. *Id.* (internal citations omitted). An ALJ is not required to accept the limitations presented in a hypothetical and may reject them if supported by substantial evidence. *Id* at 756-57.

Here, the ALJ presented a hypothetical question to the VE about whether a person with the impairments he found plaintiff to possess could perform past relevant work. AR 752. The hypothetical described someone able to perform at least light work, with the option to sit, stand, and walk no longer than thirty minutes in any position, who could not do much moving, and who had decreased concentration ability. *Id.* The VE responded that such a person could not perform past relevant work, but then explained that he could perform other types of work such as "a variety of assembly and hand packaging types of positions including small products assembler, which would be a light unskilled occupation" as well as "assembly

workers in the sporting goods industry." AR 752-53. He also opined that these positions were available locally and nationwide. AR 752-54. This hypothetical was consistent with the ALJ's RFC determination.

In his decision, the ALJ found:

> Specifically, Mr. Stipe identified the job of "Assembly of small products or in sporting goods" with 700-to-6,000 jobs in Oregon and 75,000-to-750,000 jobs in the national economy; "Hand Packager," with 2,200 jobs in Oregon and 250,000 jobs in the national economy; "Electronics work packager or inspector," with 1,200 jobs in Oregon and 200,000 jobs in the national economy. I concur with the impartial vocational experts (sic) opinion and conclude that the claimant has the residual functional capacity to make a successful vocational adjustment to "other work," requiring no more than unskilled entry level work knowledge, at a light exertion level, existing in significant numbers in the national economy.

AR 549.

The plaintiff's attorney added limitations to the hypothetical and argues that because the VE indicated that there would be no jobs for someone who was in pain at the "eight, nine or ten level at least one-third of the time, during which period of time they'll be working at about 30 percent of a normal pace . . . [with] deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner," the ALJ erred in concluding there would have been jobs available for the claimant. AR 754. The ALJ was not required to accept the limitations inherent in the hypothetical posed by the plaintiff's question because they were not supported by substantial evidence existing in the record. *Osenbrock v. Apfel,* 240 F.3d 1157, 1164-65 (9th Cir. 2001).

Finally, the claimant argues that because the VE indicated that statistics about the job availability back to 1977 were not available or as up to date as statistics today, that the VE's testimony lacked foundation to support the conclusion that jobs existed. Pl. Op. Br. 20. The VE did, in fact, state that the published data going back to the 1977 time frame was not of the same quality or specificity as data that is now prepared and routinely used. AR 753. This highlights just one of the difficulties present in this case associated with trying to go back

more than twenty years to make a determination that someone was disabled by their date last insured, which was September 30, 1982. Nevertheless, the ALJ's decision mentioned not only the known jobs at that time — small product assemblers and hand packers — but also included general reference to the lowest skilled jobs available. AR 549. There is no reason to believe that low skilled jobs — small product assemblers and hand packers and other light-unskilled jobs — are a recent phenomena.[7] The ALJ has substantial authority relating to the evidence received and the evaluation of that evidence. 42 U.S.C. § 405(b)(1) (broadly defining evidence for purposes of disability); *Andrews*, 53 F.3d at 1039 (indicating ALJ has broad authority to resolve ambiguities in record). While it would have been better for the VE to have presented historical evidence relating to specific jobs available in 1977, the lack of such specific data does not preclude the ALJ from making his best assessment based on the available data.

X. CONCLUSION

While sympathetic to the impairments suffered by Mr. Talley, the role of this Court is limited to reviewing the decision of the ALJ to determine if those findings are supported by substantial evidence. Where the evidence is susceptible to more than one rational interpretation, the Commissioner's conclusion must be upheld. *Thomas*, 278 F.3d at 954. In this case, the Commissioner's decision is supported by substantial evidence.

Accordingly, I recommend that the final decision of the Commissioner be affirmed. A proposed Order accompanies this Report and Recommendation.

DATED this 31st day of August, 2005.

James P. Donohue

JAMES P. DONOHUE
United States Magistrate Judge

[7] Because the advent of the personal computer came after the last date of insurability in this case (September 30, 1982), the same cannot be necessarily said about an electronics work packager.